

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
DAVID A. PRAVDA

74-2468

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

AARON L. STEWART,

Defendant-Appellant.

* * * * *

APPELLANT'S BRIEF

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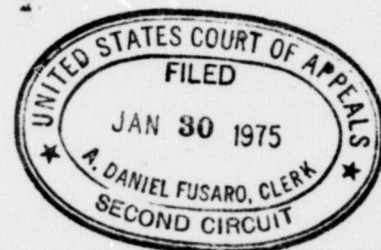


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Docket No: 74-2468

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-against-

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APPELLANT AARON L. STEWART'S BRIEF

INTRODUCTORY STATEMENT

The defendant-appellant, AARON L. STEWART, appeals from a judgment of the United States District Court for the Southern District of New York, rendered on November 7, 1974, convicting appellant, after a trial before District Judge John M. Cannella and a jury, of one count of conspiracy [18 U.S.C. §371]; one count of bank robbery by force and violence and by intimidation [18 U.S.C. §2113(a)]; and one count of

placing persons in jeopardy during the charged bank robbery [18 U.S.C. §2113(d)].

The appellant was sentenced to a prison term of five years on Count 1 [18 U.S.C. §371], ten years on Count 2 [18 U.S.C. §2113(a)] and ten years on Count 3 [18 U.S.C. §2113(d)]. Each of the prison sentences were made concurrent. In addition, appellant was fined \$10,000 on Count 1; \$5,000 on Count 2; and \$10,000 on Count 3.

The appellant had been indicted (p.2a)* with seven co-defendants. Six of the co-defendants pleaded guilty to one count of the indictment prior to the appellant's trial. The seventh co-defendant has not yet pleaded guilty, but has indicated his intention to do so. All seven co-defendants testified for the government against the appellant.

The appellant tried the case on a theory that did not contest that a bank robbery had taken place, but did dispute that appellant was one of the persons involved in the bank robbery (p. 67a).

* Page numbers in parentheses followed by a lower case "a" refer to the pages of appellant's appendix. The appellant's appendix is paginated at the bottom center of each page with the page number followed by a lower case "a".

QUESTIONS PRESENTED

1. Did the trial court commit error in charging the jury with a "cancer analogy" anecdote as a part of the Allen charge?

2. Did the trial court commit error in charging the jury that eight persons were involved in the robbery, when appellant's counsel had advanced the theory that only seven persons participated in the robbery?

3. Did the trial court commit error in refusing to permit appellant's counsel to examine and utilize Court's Exhibits "2", "3" and "4"?

4. Should the indictment have been dismissed because of the failure of the government, after due demand, to furnish certain exculpatory material then in the government's possession?

5. Did the trial court commit "plain error" in charging the jury on the "placing life in jeopardy" count [18 U.S.C. §2113(d)] of the indictment?

6. Did the trial court commit error by charging the jury with regard to the culpability of a co-defendant not on trial?

The appellant urges this Court to answer each question in the affirmative.

FACTS OF THE CASE

On November 15, 1973 a branch of the First National City Bank in the Bronx was robbed. Six persons entered the bank wearing ski masks or other disguises. Several of the persons appeared to be armed. A seventh confederate was several blocks away from the robbery with the getaway cars. The prosecution witnesses testified that an eighth confederate, the leader of the group, was directly outside the bank. The prosecution contended that the appellant was one of the six actually in the bank.

The appellant defended the case on the alternative theories that either the person in the bank who was claimed to be the appellant was a different, still unknown confederate of the robbers, or there were only seven robbers and the leader of the group was not directly outside the bank, but was one of the six persons in the bank. The matter was tried before the Hon. John M. Cannella and a jury on July 24th, 25th, 26th and 29th, 1974. The government's case consisted, inter alia, of the testimony of six of the seven alleged accomplices, all of whom identified the appellant as a participant in the robbery. The trial ended in a hung jury and a new trial was scheduled.

The case was re-tried, again before the Hon. John M. Cannella and a jury. The re-trial on September 9th, 10th, 11th and 12th, 1974 resulted in the conviction here under appeal. In the second trial, the government called as witnesses for the prosecution all seven of the self-confessed participants in the robbery; the six who had testified at the first trial, plus the seventh, one Robert Ruddock, who had not testified at the first trial. All seven testified that the appellant had participated in the robbery.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY USING A "CANCER ANALOGY" ANECDOTE AS PART OF THE ALLEN CHARGE

The jury began its deliberations on September 11, 1974 at 4:21 P.M. (p. 98a). Deliberations continued, with a dinner recess, until adjournment at 10 P.M. (p. 109a) on that day. Deliberations resumed the following morning, September 12, 1974, at 10 A.M. (p. 110a). At 11:15 A.M. the jury reported itself at an impasse (p. 110a).

The trial court proposed to give an Allen charge and there was some discussion as to the exact language of the Allen charge to be used (pp. 110a-112a). When the jury

returned to the courtroom, but before giving the previously discussed Allen charge, the trial court charged:

"I am reminded that your task is very much like a surgeon who is confronted with, say, a mass in the abdomen of a patient, and he has to find out whether or not that is a real serious thing like a cancer, or that it is benign; and simply removing it will put that patient back in good health. So he opens up the person. He doesn't want to find cancer; he couldn't be more happy to find it is benign. But if he finds it is, there is nothing he can do about it. He has to report.

"You are in the same situation. Nobody likes to find anybody guilty, no question about it..." (pp. 112a-113a).

The appellant promptly excepted to the foregoing "cancer analogy" (p. 116a).

Some time thereafter, the exact time not being reported in the transcript, the jury requested the re-reading of one witness' testimony (p. 118a). After the witness' testimony had been re-read, the trial judge said:

"...During the course of those discussions, on reflection, it seems to me I made an example which is not entirely within the scope of the facts in this case at all; and, as a matter of fact, I think it is an unfair example. And therefore, I tell you now to disregard the example that I gave you, and that is example is of no value to you whatsoever in arriving at a verdict, you are to forget all about it..." (p. 119a).

It is respectfully argued to this Court that the so-called "cancer analogy" is highly prejudicial, and in and of

itself would require this Court to grant appellant a new trial. This Court has specifically disapproved of this "cancer analogy." United States v. Chaplin, 435 F2d 320 (2nd Cir., 1970). In the Chaplin case, supra, this Court was faced with a situation where the defense lawyer had not excepted to the "cancer analogy;" and the issue was being urged on appeal as "plain error." The Court held:

"While we agree that the cancer analogy... [was] unfortunate, we do not find [it] to be plain error..." United States v. Chaplin supra, at 323.

In the instant case the appellant took immediate exception to the charge and has thus eliminated the problem of the Chaplin case, supra.

It is submitted that the trial judge's attempt to nullify the damage was not timely and was inadequate and unexplicit. The trial court indicated at the sentencing (p. 130a) that it recognized the error almost immediately. The trial court should have immediately recalled the jury and instructed it properly. Instead, the trial judge waited until the jury returned on its own motion, and then only instructed the jury after they had sat through an extensive re-reading of testimony. In addition, the attempted curative instruction was not specific enough as to what portion of the charge was being nullified. The particular situation

was not decisively identified so as to distinguish for the jury the erroneous instruction from the other instructions given at the same time (pp. 112a-116a).

In Seaboard Air Line Ry Co. v. Bailey, 190 F2d 812 (5th Cir., 1951) it was held that an erroneous instruction could be withdrawn, but the "...withdrawal must leave no doubt in the minds of the jury....To be effective, the correction must be clear and specific." 190 F2d 812, 815.

"Instructions given for the purpose of correcting prior errors must do so in clear and unmistakable terms." Baer Bros. Land & Cattle Co. v. Palmer, 158 F2d 278, at 281 (10th Cir., 1946).

The instant case did not provide a correction in clear and unmistakable terms. The correction should have specifically referred to the surgeon and the cancer rather than to "an example not within the scope of the facts."

Further, the time lapse can not be said to have cured the defect. True, an immediate guilty verdict after the "cancer analogy" would demonstrate overwhelming prejudicial error, but the error still remains even with the time lapse. In an obviously close case, where one jury had previously been "hung" and the second jury had already reported itself at an impasse after many hours of deliberation, no one can

know what delayed effect the erroneous remarks may have had.

The "cancer analogy" is so graphic in its impact and the subject matter so potent in its effect on people, that this Court must reverse the conviction and remand the case for a new trial.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CHARGING THAT EIGHT PEOPLE WERE INVOLVED IN THE ROBBERY.

In charging the jury, the trial court included in its instructions the language, "We know, for example, that seven of the eight persons involved in this case came here and testified..." (p. 75a). The appellant excepted to that part of the instructions (pp. 96a-97a) at the conclusion of the charge, but the trial court declined to instruct further on that point.

In light of the fact that one of the appellant's alternative theories of the case was that there were only seven participants in the robbery, it is urged that the trial court's comment that "seven of the eight persons involved" testified was an implicit rejection of appellant's theory, and as such constituted reversible error. Cf., Womack v. United States, 336 F2d 959 (D.C. Cir., 1964).

POINT III

THE TRIAL COURT SHOULD HAVE PERMITTED
THE APPELLANT TO EXAMINE COURT'S EXHIBITS
"2", "3" and "4".

Five of the government witnesses against appellant were, or may have been, involved in at least one murder in Queens County and two of the witnesses may have been involved in two such murders (pp. 16a-18a).

The information on these matters which the government had was furnished to the trial court which denominated the information as Court's Exhibits "2", "3" and "4" and ordered said exhibits sealed (p. 7a-entry of 7-25-74). The exhibits, under seal, have been transmitted to this Court (p. 10a-entry of 11-25-74), as part of the record on appeal. Neither the appellant or appellant's counsel have seen the exhibits.

It is respectfully requested that this Court examine said exhibits to review the trial court's decision not to disclose the contents thereof. It is urged upon this Court that the information, some of which may have been useful to appellant for purposes of cross-examination or otherwise [see for e.g., the witness' Evans taking the Fifth Amendment on a question about Daniels (pp. 32a-33a)], should have been disclosed.

POINT IV

THE INDICTMENT SHOULD HAVE BEEN
DISMISSED BECAUSE OF THE GOVERN-
MENT'S FAILURE TO FURNISH REQUESTED
"BRADY" INFORMATION

Appellant made specific request for any information of an exculpatory nature which the government would be required to furnish appellant under the authority of Brady v. Maryland, 373 U.S. 83 (1963). Appellant's request for Brady material is confirmed in the government's letter to appellant's counsel (p. 11a and particularity Item 14 on p. 15a).

In the first trial of this indictment, which ended in a hung jury, Robert Ruddock, an alleged accomplice of the appellant, was not called as a witness. In the second trial, Ruddock did testify for the prosecution.

At the second trial, in connection with the government's obligation under the Jencks Act [18 U.S.C. §3500], the government furnished appellant with a copy of an F.B.I. report of an interrogation of Ruddock. This report was government's exhibit 3509-E for identification and was introduced in the second trial as Defendant's Exhibit "B" (p. 19a). The report, inter alia, gave a detailed account of the bank robbery that is the subject of the instant case. The report either named or described the participants in the robbery at the bank. The report completely omits any

reference, by name or description, to the appellant. [The report also omits reference to the guardian of the getaway cars, but this person was not alleged to have been at the actual bank robbery]. The one participant in the robbery who is described but not otherwise named was established to be the accomplice Evans (pp. 56a-57a); not the appellant.

At the earliest opportunity, the appellant moved to dismiss the indictment because of the failure to furnish the F.B.I. report (p. 19a) as Brady material in the first trial (pp. 34a-36a). The trial court reserved decision on the motion throughout the second trial and ultimately decided the motion adversely to the appellant (pp. 128a-129a), on the rationale that the F.B.I. report was available at the second trial and that the report did not have Ruddock affirmatively state appellant was not there, but simply did not mention appellant.

It is submitted to this Court that an affirmative statement that appellant was not at the robbery would be nothing short of a miracle absent a direct question from the interrogators. There can be no choice but to proceed from negative implication.

The fact that the report was available at the second trial in no way diminishes the government's failure at the first trial. Since the first trial ended in a hung jury, there is no way to assess what benefit may have accrued to

appellant in the first trial had the report been available.

Under the tests set forth by Moore v. Illinois, 408 U.S. 786 (1972) and the Keogh cases in this Circuit, United States v. Keogh, 440 F2d 737 (2nd Cir., 1971) and United States v. Keogh, 391 F2d 138 (2d Cir., 1968) the failure by the government does constitute a violation of the Brady doctrine.

It is urged upon this Court that the proper sanction is dismissal of the indictment. Cf., United States v. Sperling, 16 Criminal Law Reporter 2133 (2nd Cir., 1974).

POINT V

THE TRIAL COURT COMMITTED "PLAIN
ERROR" IN ITS CHARGE ON THE "PLAC-
ING IN JEOPARDY" COUNT OF THE
INDICTMENT.

The testimony regarding the weapons possessed by the robbers was in conflict at the trial.

The witness Evans testified (p. 30a) that Boo Boo [Stitch] had a simulated handgrenade, Frank [Henegan] had a shotgun, Chris [Ruddock] had a pistol and "...I don't recall Aaron [appellant], whether he had a pistol or not..." (p. 30a). Evans himself had no pistol.

The witness Stitch acknowledged that he had a simulated grenade (p. 38a) which would not operate and that:

"A. Everyone had weapons. You know, with the exception -- like all the fellows I know had weapons. I can't speak for Sandra, I don't know. I don't remember.

Q. Do you recall what kind of weapons people had?

A. Everyone with the exception of myself had pistols and Frank Henegan had a sawed-off shotgun." (p. 38a)

Later Stitch testified:

"A. Well, Frank [Henegan] had a sawed-off shotgun and I think only one person -- I don't really remember who it was, had their own pistol; and David [Williams] had about, I think about three. I think there was two 38's and a 32.

Q. What about the ammunition? Did you know if there was ammunition?

A. I couldn't say that I sat down and watched them load the guns or unload the guns. But I assume that the guns were ---.

MR. PRAVDA: I object to what he assumed.

Q. Not what you assume. You don't know of your own knowledge?

A. No." (pp. 40a-41a).

Thus Stitch's testimony conflicts with Evans as to who had pistols. The only certainty in Stitch's testimony is that he did not know if any of the weapons were loaded.

The witness Williams testified (p. 43a) that Stitch had a dummy handgrenade, that Henegan had a pistol, that

Evans had borrowed a pistol, and Williams had his own pistol. Here again the testimony was in conflict as to who had what weapons.

Williams went on to testify that his gun was loaded (p. 44a); however he had testified that he himself never entered the bank. Williams also testified under questioning by the trial Court:

Q. What about the others,
did you know if their guns were loaded?

A. I can assume they were loaded.

Q. No assumptions. Of your own knowledge.
Did you see them load or did you see
ammunition or anything like that?

A. Yes, there were bullets in the gun."
(p. 44a).

Henegan testified that he had a shotgun and everybody else except Sandy [Becote] and Evans had a pistol (p. 47a). This conflicts with prior testimony by the others about Stitch and conflicts in part with testimony about Evans.

The following day Henegan was still on the stand and was asked by the trial court whether he had been asked the previous day about the weapons. Henegan said he had not been asked (p. 49a), although the transcript is clear that he had been asked. Upon re-inquiry, Henegan stated that his sawed-off shotgun was not loaded and he could

not state whether or not anybody else's weapon was loaded (pp. 49a-51a).

Finally, Ruddock testified (p. 53a) that he had a loaded revolver, Henegan had a shotgun, Boo [Stitch] had a grenade and:

"A. ...I'm not sure what kind of pistol Aaron had, I don't know whether that was automatic or not.

Q. Do you recall specifically that he had a pistol also?

A. Everyone had a pistol. The only one who didn't have a pistol was Boo [Stitch] and Sandra [Becote], the woman." (pp. 53a-54a).

Ruddock's testimony is thus also in conflict with the others about who had what weapons. However, Ruddock does acknowledge that his own weapon was loaded.

Williams testimony, supra, that the other guns were loaded is partially refuted by Henegan who specifically stated that his weapon was not loaded.

The various testimony as to whether or not the appellant carried a weapon, loaded or unloaded, is completely contradictory.

The only people who acknowledged having a loaded weapon were Williams, who in any event claims he never entered the bank, and Ruddock. Williams testified the other guns were loaded, but this testimony was controverted by other testimony.

As regards Williams, appellant moved to set aside the verdict because of an alleged perjury by Williams in another case (p. 126a-127a). The trial court denied the motion (pp. 127a-128a) stating that since every other witness told essentially the same story, the Williams testimony was not crucial. However, as regards the "life in jeopardy" count, Williams' testimony was not cumulative, and was in fact crucial. The government itself, in summation, recognized Ruddock's many testimonial errors and simply advised the jury that Ruddock was wrong (pp. 63a and 65a). If Ruddock was wrong about the loaded weapon, then only Williams' testimony injects a loaded weapon into the robbery and the status of Williams' purported perjury takes on new significance.

To complicate the matter, the trial court's charge on the law of 18 U.S.C. §2113(d) (pp. 89a-91a) was grossly inadequate; it made no clarification of the objective test of jeopardy required in this Circuit. The trial court charged the jury on a subjective standard as to whether the jury felt the persons in the bank felt they were in jeopardy (p. 91a).

The law in this Circuit requires the giving of a charge with the objective jeopardy standard. United States v. Marshall, 427 F2d 434 (2d Cir., 1970). See also, United States v. Cady, 495 F2d 742 (8th Cir., 1974) and United States v. Coulter, 474 F2d 1004 (9th Cir., 1973). The fact that an exception was not taken is irrelevant, as the

failure to charge 18 U.S.C. §2113(d), properly has been held to be "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. United States v. Marshall, supra.

POINT VI

THE TRIAL COURT COMMITTED ERROR BY
INSTRUCTING THE JURY ON THE CUL-
PABILITY OF A CO-DEFENDANT NOT ON
TRIAL

In response to a question by one of the jurors, the court charged the jury (pp. 115a-116a) that Williams would be equally culpable were he found to be inside the bank or outside the bank. The appellant excepted to the charge (p. 116a) on the ground that Williams was not on trial and the law as it related to him should not have been expounded so as to possibly confuse the jury. It is respectfully submitted to this Court that the trial court erred in this regard.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED AND THE INDICTMENT
DISMISSED, OR IN THE ALTERNATIVE,
THE CASE SHOULD BE REMANDED FOR A
NEW TRIAL IN THE DISTRICT COURT.

Respectfully submitted,

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